

BRB No. 03-0573 BLA

KATHRYN L. CORNETT)
(Widow of ELMER R. CORNETT))

Claimant-Petitioner)

v.)

DATE ISSUED: 05/28/2004

CONSOLIDATION COAL COMPANY)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand – Denying Benefits (01-BLA-0334) of Administrative Law Judge Robert J. Lesnick on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹Claimant is the surviving spouse of the deceased miner who died on May 16, 1998. Director's Exhibit 5.

amended, 30 U.S.C. §901 *et seq.* (the Act).² This case is before the Board for the second time. By Decision and Order dated October 15, 2002, the Board, *inter alia*, vacated the administrative law judge's finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and remanded the case for further consideration. *Cornett v. Consolidation Coal Co.*, BRB No. 02-0138 BLA (Oct. 15, 2002)(unpublished) (McGranery, J., concurring and dissenting) (Hall, J., concurring and dissenting).³ The Board also vacated, in part, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. In light of his denial of benefits, the administrative law judge found it unnecessary to reconsider his award of attorney fees. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in according determinative weight to the opinions of Drs. Oesterling, Branscomb, Tomashefski, Naeye, and Fino that the

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Judge McGranery concurred in Judge Smith's opinion to remand the case for reconsideration of the attorney fee petition and dissented from the majority's determination to vacate the decision awarding benefits.

Judge Hall dissented from the majority's decision to remand the case to the administrative law judge to reconsider the attorney fee petition and she concurred in all other respects in the majority opinion.

miner's death was not due to pneumoconiosis, because their opinions were more consistent with the objective evidence showing only a mild impairment. Claimant argues that, contrary to the administrative law judge's finding, the evidence reveals that the miner suffered from a more significant pulmonary impairment at the time of his death. In support of her contention, claimant references the miner's 1997 hospitalization for knee replacement surgery during which he was administered oxygen, *see* Director's Exhibit 9, as well as the finding of the miner's treating physician, Dr. Ulrich, that the miner "developed shortness of breath over the years," Director's Exhibits 9, 31, and several pathology reports diagnosing emphysema, *see* Director's Exhibit 35; Employer's Exhibit 7. Claimant also argues that the administrative law judge erred by failing to resolve the conflicting evidence regarding the miner's emphysema and its cause, and erred in failing to determine what role, if any, the emphysema played in the miner's death.

Upon review of the administrative law judge's Decision and Order, we hold that the administrative law judge erred in focusing upon whether the evidence was sufficient to establish that the miner was totally disabled at the time of his death. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Whether or not a miner's pneumoconiosis was disabling at the time of his death is not determinative of the relevant issue; *i.e.*, what contribution, if any, the miner's pneumoconiosis made to his death. Compare 20 C.F.R. §718.204(b) with 20 C.F.R. §718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Moreover, the administrative law judge made improper medical determinations by providing his own interpretation of the objective evidence of record in determining whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

We also agree with claimant that the administrative law judge's analysis that the medical evidence is insufficient to establish that the miner's death was due to pneumoconiosis does not comply with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the

administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.⁴ *See Shuff, supra.*

On remand, should the administrative law judge award benefits, he must reconsider his Supplemental Decision and Order Granting Attorney Fees (01-BLA-0334) as previously instructed by the Board. *See Cornett v. Consolidation Coal Co.*, BRB No. 02-0138 BLA (Oct. 15, 2002)(unpublished) (McGranery, J., concurring and dissenting) (Hall, J., concurring and dissenting).

⁴Claimant's additional contention, that the administrative law judge erred in relying on employer's experts' opinions at 20 C.F.R. §718.205(c)(2) because those opinions are not credible, amounts to an improper request that the Board reweigh the evidence. It is the province of the administrative law judge to determine the weight and credibility of the medical evidence. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge